

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

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|------------------------------------|---|----------------|
| RONALD TANKARD |) | |
| Claimant |) | |
| |) | |
| V. |) | |
| |) | |
| SPIRIT AEROSYSTEMS, INC. |) | CS-00-0162-193 |
| Respondent |) | AP-00-0451-027 |
| |) | |
| AND |) | |
| |) | |
| NEW HAMPSHIRE INSURANCE CO. |) | |
| Insurance Carrier |) | |

ORDER

STATEMENT OF THE CASE

Claimant requested review of the May 13, 2020, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Phillip B. Slape, of Wichita, Kansas, appeared for claimant. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant's repetitive work activity through August 10, 2018, was not the prevailing factor in causing his right shoulder injury, based on the opinions of the court-ordered physician. The ALJ denied claimant's preliminary benefits pending further hearing.

The record on appeal is the same as that considered by the ALJ, and consists of the transcript of the August 22, 2019, Preliminary Hearing and the exhibits, and the transcript of the August 15, 2019, evidentiary deposition of Terrence Pratt, M.D., and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues his condition is not the natural progression of a remote injury from 2013, but the result of repetitive use doing the same unrestricted work duties he performed for 33 years. Claimant contends he was never informed by a physician his injury was work-related; therefore, his statutory date of injury is on or about September 10, 2018, when claimant was first placed on work restrictions by his physician. Claimant argues the ALJ's Order should be reversed.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues the prevailing factor for claimant's right shoulder condition and need for medical treatment is not the activity performed through 2018, but is rather the natural and probable consequence and progression of the medical condition diagnosed in 2013.

The issues for the Board's review are:

1. Did claimant's alleged injury by repetitive trauma arise out of and in the course of his employment?
2. What is the prevailing factor causing claimant's medical condition and need for medical treatment?

FINDINGS OF FACT

Claimant worked as a drivematic machine operator for respondent (formerly Boeing Aerospace Company) for 33 years. In this position, claimant loaded airplane parts of various sizes and weights onto his table to run through a machine. The parts weighed from 10 pounds up to 75 pounds. Claimant developed pain in his right shoulder, and on March 21, 2013, was sent to Spirit Medical clinic by respondent. He reported problems with right shoulder pain that gradually came on over the 8 to 9 months prior to March 21, 2013. The Spirit Medical clinic records note claimant felt his job seemed to aggravate his right shoulder, although he thought his shoulder did better in the summer months; he did not know if he had arthritis in his shoulder.¹ Dr. Angela Meyer examined claimant and ordered an MRI of the right shoulder and physical therapy. Claimant was not taken off work or placed on restricted duty.

An MRI of claimant's right shoulder taken March 21, 2013, revealed a small rotator cuff tear. Claimant was provided medication and physical therapy, with no resulting permanent restrictions. Claimant stated the physical therapy helped for a time, but he felt his shoulder pain gradually returned 7 to 8 months after returning to work. Claimant was seen for follow-up visits several times at the Spirit Clinic. On April 9, 2013, Dr. Steven Hughes, D.O., noted a review of the MRI report and diagnosed right shoulder impingement syndrome, with tendonitis and a degenerative supraspinatus tear. Claimant was last seen in 2013 on May 23 by Jon Kirkpatrick, D.O. Claimant was released to return to work without restrictions.

Based upon the Spirit Medical records, claimant was not taken off work or placed on restricted duty between March 21 and May 23, 2013. Claimant testified he was not told this was a work-related condition, but agreed he considered his condition to be work-

¹ P.H. Trans., Cl. Ex. A.2 at 3.

related because he reported it to respondent and was provided workers compensation benefits.

Claimant's pain continued to worsen each working day until it was intolerable, and he again reported his right shoulder issues to respondent on August 10, 2018. Another MRI of claimant's right shoulder was taken September 4, 2018, and read to show a new full-thickness retracted tear of the supraspinatus and infraspinatus tendons, partial tearing and tendinosis of the subscapularis tendon, possible tenosynovitis of the proximal biceps, and a suspected tear of the posterior superior labrum.

Claimant was referred to Dr. Daniel Prohaska through the Spirit Medical Clinic. Except for a causation opinion, Dr. Prohaska's records are not in evidence. Spirit Medical Clinic records noting some of Dr. Prohaska's findings were admitted into evidence without objection. Dr. Prohaska found claimant to be at maximum medical improvement on September 11, 2018. Dr. Prohaska provided a causation opinion on November 2, 2018, finding claimant's August 10, 2018, work-related injury by repetitive trauma was not the prevailing factor causing claimant's right shoulder condition.

Dr. Pedro Murati examined claimant at his counsel's request on November 27, 2018. Claimant's chief complaints were constant pain in his right shoulder radiating into his neck and upper back, numbness and tingling in his right upper extremity with overhead reaching, and difficulty sleeping due to pain. Dr. Murati reviewed claimant's medical records, history, and performed a physical examination. Dr. Murati noted claimant sustained a right shoulder rotator cuff tear consistent with his MRI, and a direct result of his repetitive trauma at work. Dr. Murati recommended further medical treatment. He wrote:

There is significant new and distinct anatomical change when comparing the MRIs of the right shoulder performed in 2013 to the one completed in 2018. He has significant clinical findings that have given him diagnoses consistent with his described multiple repetitive traumas at work. Apparently, on this examinee's date of injury he sustained enough permanent structural change in the anatomy of his right shoulder which caused pain necessitating treatment. Therefore, it is under all reasonable medical certainty and probability that the prevailing factor in the development of his conditions is the multiple repetitive traumas at work.²

Dr. Terrence Pratt examined claimant for a court-ordered independent medical evaluation on April 2, 2019. Claimant's chief complaint was continuous right shoulder aching and locking, with stiffness, weakness, and intermittent numbness. Dr. Pratt took a history from claimant, which included a specific traumatic incident occurring in 2013. Claimant denied describing a specific event in 2013 to Dr. Pratt.

² P.H. Trans., Cl. Ex. A.1 at 5.

Dr. Pratt reviewed claimant's medical records and performed a physical examination, finding claimant sustained right shoulder syndrome with full-thickness rotator cuff tears with retraction and atrophy, and findings suggesting a labral tear and degenerative changes. Dr. Pratt recommended claimant undergo an evaluation with a specialist, though not as a result of claimant's August 2018 work event. Dr. Pratt concluded:

The prevailing factor for [claimant's] shoulder involvement includes his reported vocationally related activities apparently in 2013 and subsequent chronic involvement of the shoulder. The 2018 event is not the prevailing factor for the involvement but was in the aggravating event for the shoulder. The MRI noted atrophy and retraction with rotator cuff tears.³

During his deposition, Dr. Pratt reviewed additional medical records and acknowledged claimant sustained repetitive trauma in 2013 as opposed to a specific event. Dr. Pratt testified the structural changes noted in claimant's 2018 MRI preexisted claimant's work activities in August 2018.⁴ Dr. Pratt agreed claimant's right shoulder symptoms could have been caused by 33 years of repetitive overuse of the shoulder, but the prevailing factor would be more specific to repetitive activities from 2013 forward. Dr. Pratt explained:

A. When we say prevailing factor for the structural changes of his shoulder would be his 2013 event with rotator cuff involvement and degeneration at that time which progressed between 2013 to 2018 resulting in structural changes of his shoulder, or more significant structural changes.⁵

. . .

Q. If there was no one-time trauma in 2013, what would your opinion today be concerning prevailing factor?

A. That it relates to his repetitive activities that resulted in symptoms in 2013 and continuing thereafter.⁶

Dr. Pratt also stated:

2013 was the initial event. August 2018 was when he reported he had a second . . . event, but that reported activities in August of 2018 did not result in the

³ Pratt Depo., Ex. A.1 at 4.

⁴ See Pratt Depo. at 23.

⁵ *Id.* at 14-15.

⁶ *Id.* at 17.

structural changes of his shoulder. The structural changes were present preexisting that.⁷

Dr. Pratt agreed the rotator cuff tear worsened between 2013 and 2018. Dr. Pratt testified:

Q. Do you believe that at some point in time between 2013 and 2018 that rotator cuff, the rip in the rotator cuff increased in size?

A. Between 2013 and 2018?

Q. Yes.

A. There was a change in his rotator cuff involvement between those periods of time where the rotator cuff involvement worsened, yes.

Q. When you're saying worsening, does that mean that there's a larger tear in the rotator cuff?

A. Yes.

Q. Or more extensive tear in the rotator cuff?

A. More extensive tear in the rotator cuff.⁸

When asked about the relationship of the worsening shoulder problems, Dr. Pratt testified:

Q. Doctor, the progression that you're describing, was that progression caused by his repetitive work duties between 2013 and 2018?

A. If it's true that he continued to perform the same activities that caused his 2013 involvement, then continuing those activities resulted in progression as worsening of the underlying involvement.⁹

Claimant has not received medical treatment for his right shoulder since he treated with Dr. Prohaska. Claimant continues to have pain and other symptoms in his right shoulder. He continues to work for respondent within the restrictions provided by Dr. Prohaska.

⁷ *Id.* at 13.

⁸ *Id.* at 23.

⁹ *Id.* at 25.

PRINCIPLES OF LAW

K.S.A. 2018 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2018 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2018 Supp. 44-508(f) states, in part:

(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2018 Supp. 44-508(e) states, in part:

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2018 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹¹

ANALYSIS

In his Application for Hearing (Form K-WC E-1) filed with the Division of Workers Compensation, claimant alleged an injury arising out of repetitive trauma due to repetitive work duties ending on or about September 10, 2018. No start date for the repetitive trauma was noted in the Application.

In its brief, respondent argues claimant's condition is the natural and probable consequence of an injury occurring on May 21, 2013. Claimant received medical treatment at respondent's medical clinic beginning on May 21, 2013. The records from claimant's treatment make no note of a single traumatic injury. The only references to causation in the clinic records relate to repetitive work activities, the same activities claimant was performing through September 10, 2018.

¹⁰ K.S.A. 44-534a.

¹¹ K.S.A. 2018 Supp. 44-555c(j).

To prove a current condition is related to a prior accident, there must be a prior accident. There is no evidence in the record proving one of the triggering events required to establish a date of accident pursuant to K.S.A. 2018 Supp. 44-508(e) occurred in 2013. Claimant was not taken off work by a physician, he was not placed on restricted duty, and he was not advised by a physician his shoulder condition was work-related.

Based upon Dr. Pratt's testimony, the prevailing factor for claimant's shoulder condition is the work activities claimant performed for respondent before and after 2013. When asked his prevailing factor opinion, assuming there was no one-time trauma in 2013, Dr. Pratt stated the structural changes of claimant's shoulder related to his repetitive activities resulting in symptoms in 2013 and continuing thereafter.

Even if claimant suffered a compensable injury in 2013, the evidence presented supports finding claimant suffered a change in the physical structure of his shoulder associated with repetitive work activities performed after 2013. Both Drs. Murati and Pratt found claimant's rotator cuff tear was larger in 2018 than it was in 2013. Dr. Pratt specifically stated the continuing work activities resulted in worsening of the underlying involvement, i.e., rotator cuff tear. The change in his physical condition caused by subsequent work activities would also be compensable.

The undersigned finds claimant's shoulder condition is the result of repetitive trauma, the beginning of which pre-dates the 2013 medical treatment, related to his repetitive work activities while working for respondent.

CONCLUSION

Claimant suffered a compensable shoulder injury as the result of his work-related injury by repetitive trauma.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member the Order of Administrative Law Judge Thomas Klein dated May 13, 2020, is reversed. Respondent shall submit the names of two health care providers, not associated in practice together, from which claimant shall choose one from the list who shall be the authorized treating health care provider pursuant to K.S.A. 44-510h(b)(1).

IT IS SO ORDERED.

Dated this _____ day of August, 2020.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Hon. Thomas Klein, Administrative Law Judge